



# PUBLIC NOTICE

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## WIRELESS TELECOMMUNICATIONS BUREAU MODIFIES EX PARTE RULES FOR ENVIRONMENTAL ASSESSMENTS SUBMITTED FOR POSITIVE TRAIN CONTROL FACILITIES

By this Public Notice, the Wireless Telecommunications Bureau (Bureau) announces pursuant to Section 1.1200(a) of the Commission's rules<sup>1</sup> that effective immediately, when a railroad submits a license application with attached Environmental Assessment (EA) for Positive Train Control (PTC) facilities prior to completing its obligations under the Commission's rules implementing Section 106 of the National Historic Preservation Act (Section 106),<sup>2</sup> communications between the Commission and Tribal Nations, and between the Commission and State Historic Preservation Officers (SHPOs), are exempt from *ex parte* restrictions.

Ordinarily, when a party submits a license application, the matter is treated as a restricted proceeding under the Commission rules.<sup>3</sup> EAs for facilities constructed pursuant to geographic area licenses are submitted as applications to modify the relevant license. Consequently, should the Commission need to communicate with either a Tribal Nation or a SHPO about matters addressed in an applicant's submission, the applicant would have the right to notice and service, and the right to participate in any oral communications.<sup>4</sup> For this reason, the Commission normally prefers that applicants file EAs after they have completed their Section 106 obligations, as the *ex parte* rules make it difficult for the Commission to conduct negotiations that may facilitate the completion of the Section 106 process.

Nevertheless, we determine that under the unique circumstances surrounding the deployment of PTC systems, "the public interest . . . requires" a modification of the *ex parte*

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<sup>1</sup> 47 C.F.R. § 1.1200(a).

<sup>2</sup> 16 U.S.C. § 470f.

<sup>3</sup> See 47 C.F.R. § 1.1208 (restricted proceedings include applications for authority under Title III of the Communications Act).

<sup>4</sup> See 47 C.F.R. § 1.1202(b) (defining an *ex parte* presentation as any presentation which, if written, is not served on the parties to the proceeding, or if oral, is made without advance notice to the parties and an opportunity for them to be present).

rules in this instance.<sup>5</sup> Given the statutory deadline of December 31, 2015, for railroads to complete PTC build out,<sup>6</sup> it is imperative that environmental processing for PTC facilities not unnecessarily delay this important rail safety initiative.<sup>7</sup> Accordingly, this modification of the *ex parte* rules applies to EAs submitted for PTC facilities prior to the statutory deadline.<sup>8</sup> Should the deadline be extended either by Congress or through a waiver from the Department of Transportation, the modification to the *ex parte* rules will run through the expiration of the new deadline.

We note that this modification of the *ex parte* rules is limited to communications between the Commission and Tribal and State government entities with a formal role in the Section 106 process, thereby reducing any risk that a party could gain competitive or commercial advantage from exempt communications.<sup>9</sup> We further note that we modify the *ex parte* requirements herein only when an EA is submitted for a reason other than potential impacts on historic properties or Indian religious sites.<sup>10</sup> Under this condition, communications with Tribal Nations and SHPOs are unlikely to implicate the potential environmental impacts that caused the EA to be submitted.

This targeted modification of the *ex parte* rules will enable the railroads better to complete their obligations relating to National Environmental Policy Act compliance and Section 106 compliance in parallel. Specifically, a railroad will be able to submit an EA that is required for reasons other than Section 106 prior to completing the Section 106 process. Should issues arise in the course of a railroad completing its Section 106 obligations, the Commission will be able to resolve such issues with affected Tribal Nations and the SHPO without being subject to *ex parte* restrictions that would hinder the necessary communications. Given the exigent nature of PTC deployment, we find that this benefit of increased efficiency outweighs any harms that may be caused by permitting this limited class of communications without disclosure and serves the public interest.

Once the Section 106 process is complete, the railroad will be required to amend its EA to include the new information. The Bureau will not issue a Finding Of No Significant Impact in

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<sup>5</sup> See 47 C.F.R. § 1.1200(a).

<sup>6</sup> See Rail Safety Improvement Act of 2008, P.L. 110-432.

<sup>7</sup> For a more complete discussion of the public interest rationale for expediting review of PTC facilities while complying with environmental laws, see Wireless Telecommunications Bureau Announces Adoption of Program Comment To Govern Review of Positive Train Control Wayside Facilities, WT Docket No. 13-240, *Public Notice*, 29 FCC Rcd 5340, 5344-46 (WTB 2014).

<sup>8</sup> Although the PTC Program Comment is limited to wayside facilities that meet certain criteria and therefore are less likely to cause adverse effects to historic properties, see *id.* at 5346, this distinction is immaterial to the application of the *ex parte* rules. Accordingly, in order best to facilitate the timely deployment of PTC before the statutory deadline, this modification of the *ex parte* rules applies to all facilities constructed for the purpose of supporting PTC transmissions.

<sup>9</sup> We note that communications between Commission staff and another Federal agency with which the Commission shares jurisdiction over issues addressed in an EA are exempt from *ex parte* restrictions. 47 C.F.R. § 1.1204(a)(5).

<sup>10</sup> 47 C.F.R. § 1.1307(a)(4), (5).

any matter until all environmental processes required under Part 1, Subpart I of the rules are final.<sup>11</sup> Further, if the Section 106 process does yield a finding of adverse effect or other material change to the substance of the railroad's environmental findings, the Bureau will restart the public comment period.

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<sup>11</sup> See 47 C.F.R. § 1.1308(d).